

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands	)	WT Docket No. 03-66 RM-10586
	)	
Part 1 of the Commission's Rules - Further Competitive Bidding Procedures	)	WT Docket No. 03-67
	)	
Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service to Engage in Fixed Two-Way Transmissions	)	MM Docket No. 97-217
	)	
Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico	)	WT Docket No. 02-68 RM-9718
	)	
Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets	)	WT Docket No. 00-230
	)	

**The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance,  
Inc. ("IMWED")**

**Petition for Extraordinary Relief**

Introduction and Summary

For the reasons set forth, herein, IMWED requests that the Commission grant the following extraordinary relief: (a) that the

Commission require that EBS licensees file unredacted copies of all leases executed during the six-month period beginning January 11, 2005 and ending July 11, 2005; and (b) that these leases be made available for public inspection.

### Background

The Commission's initial decision in the above captioned proceeding,<sup>1</sup> lists six substantive use requirements, pertaining to the leasing of EBS excess capacity. They are: minimum educational use of EBS spectrum; the right to recapture additional capacity for educational purposes on analog facilities; a maximum lease term of 15 years; the EBS licensee's retaining responsibility for compliance with FCC rules regarding station construction and operation; only the EBS licensee can file FCC applications for modification to its station's facilities; and the EBS licensee must retain some right to acquire the ITFS transmission equipment, or comparable equipment, upon termination of the lease agreement.<sup>2</sup>

Recently, IMWED filed a Supplement to Petition for Reconsideration in the above-captioned proceeding. This Supplement documents the fact that Sprint has entered into a lease for excess capacity on WAU-27, the Clarendon Foundation's EBS system at Milwaukee, Wisconsin ("Sprint Milwaukee

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<sup>1</sup> *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order ("EBS/BRS Report and Order") and Further Notice of Proposed Rulemaking ("FNPRM"), FCC 04-135 (rel. July 29, 2004), 19 FCC Rcd 14165 (2004).

<sup>2</sup> EBS/BRS Report and Order, paragraph 181.

Lease”). This document raises important public policy issues, including the question as to whether these two parties seek to evade important aspects of the substantive use requirements. Some of these issues currently are before the Commission on reconsideration.

First, the length of the Sprint Milwaukee Lease---if Sprint chooses and Commission permits---will be perpetual.<sup>3</sup>

It is noteworthy that, on the public policy front, Sprint is arguing that perpetual leases should be legalized. In its Consolidated Opposition to Petitions for Reconsideration in WT Docket 03-66 (“Sprint Consolidated Opposition”), Sprint opposed pleadings submitted by the National ITFS Association and The Catholic Television Network (“NIA/CTN”) in WT Docket 03-66 that sought to maintain a maximum 15-year term limit for EBS leases. Sprint argued:

To the extent NIA/CTN is requesting that EBS spectrum leases entered into after [the effective date of the EBS/BRS Report and Order] must be subject to 15-year lease terms, such request has no merit. The underlying goal of the BRS/EBS rule overhaul has been to promote flexibility and the efficiencies that result. As explained above, the public interest and spectrum management goals derived from the Commission’s secondary market leasing policies have been well-established, and NIA/CTN does not address why the 15-year term limit is or could be consistent with these goals. In fact, NIA/CTN presents no justification for applying the 15-year limit, other than to state that it was adopted in 1998. The facts and circumstances that justified the limit in 1998, however, seem irrelevant with respect to the new, open-ended and flexible licensing rubric that

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<sup>3</sup> Sprint Milwaukee Lease, Section 2.

will govern BRS/EBS operations hereforward...<sup>4</sup> [Footnotes and emphasis omitted.]

Further, the Sprint Milwaukee Lease appears to conflict with Commission substantive use policy in another respect, as it allows Clarendon to purchase transmission equipment only if the lease is terminated as a result of action by Sprint (as opposed to simple expiration, termination as a result of regulatory action, or termination due to any number of other causes).<sup>5</sup> While the lease document pledges fealty to the Commission's Rules and policies,<sup>6</sup> the equipment purchase provision puts Clarendon in the unenviable position of arguing that one section of the agreement trumps another, given that its lessee possesses vastly greater financial resources to devote to adjudicating the matter.

Thirdly, the Sprint Milwaukee lease contains a purchase option, which allows Sprint to buy the underlying license for an undisclosed price, should the FCC in the future change the eligibility rules to allow for-profit entities to acquire EBS spectrum.<sup>7</sup>

The details of the Sprint Milwaukee Lease became public only due to unusual circumstances. It is apparent that the parties to that agreement did not want its contents made public, as the agreement contains a

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<sup>4</sup> Sprint's Consolidated Oppositions to Petitions for Reconsideration in WT Docket 03-66, pp. 6-7.

<sup>5</sup> *Id.*, Section 12.B.

<sup>6</sup> *Id.*, Section 3.B

<sup>7</sup> *Id.* Section 14.O.

confidentiality clause.<sup>8</sup> Nonetheless, public filing of this lease was required because the Clarendon Foundation sought Commission approval its acquisition of WAU-27's license from Milwaukee Regional Medical Instructional TV Station, Inc. via a transfer application filed on FCC Form 301. This application was filed on January 7, 2005,<sup>9</sup> only three days before the Rules set forth in the EBS/BRS Report and Order became effective. Had this application been submitted four days later, the application could have been filed on FCC Form 603, a form that does not require that a copy of the excess capacity lease be submitted.

On the public policy front, Sprint is arguing for the continued secrecy of EBS leases. The Sprint Consolidated Opposition opposes IMWED's proposal on reconsideration that EBS spectrum leases continue to be filed with the Commission and made public. Sprint argued:

[I]n the Secondary Markets R&O, which adopted the rules that now govern the mechanics of EBS leasing, the Commission concluded, "[w]e are streamlining the submission form to minimize the burden on lease applicants while ensuring that we receive the information we need to complete our review of the proposed arrangement and to enforce our interference and other requirements as applicable to the lessee and the licensee."

The Commission's decision to implement abbreviated filing requirements with respect to the leasing information that must be filed with the FCC represents a balancing of these two

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<sup>8</sup> See paragraph 14.S at p. 29.

<sup>9</sup> This application was assigned the file number 20050107AAA. A full copy of this application, including the Clarendon Lease appended as Exhibit 5, is available on-line at the following URL:

[http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6517882144](http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517882144)

The Commission approved this application, and on April 13, 2005, the parties filed a notification that the transfer had been consummated.

objectives. IMWED has not presented any arguments or information that would suggest that the Commission's decisions in this regard are imbalanced. To the contrary, singling out EBS spectrum leases for disparate treatment would defeat both the purposes of the secondary market rules and policies as well as the Commission's goal of achieving regulatory parity. Moreover, these agreements may contain data that involves of implicates business plans or other competitively sensitive information that would not normally be disclosed to the public.<sup>10</sup> [Footnote omitted.]

### Relief Sought

As the Commission reconsiders aspects of the EBS/BRS Report and Order, it needs to have before it the full array of pertinent facts. Numerous applications for EBS *de facto* transfer leases have been filed with the Commission since January 10th of this year. Because such applications are filed via Form 603, there is no means of verifying lease compliance with FCC substantive use requirements, or assessing how their provisions bear upon issues pending before the Commission on reconsideration.

The Sprint Milwaukee lease illustrates that important public policy matters are at stake in the fine print of EBS excess capacity lease agreements, and that able legal minds can seek inventive ways to undermine the Commission's substantive use requirements. Such strategies are abetted by secrecy.

Consequently, IMWED hereby petitions the FCC for extraordinary relief.

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<sup>10</sup> *Id.*, pp. 4-5.

We ask that the Commission require that EBS licensees file unredacted copies of all leases executed during the six-month period beginning January 11, 2005 and ending July 11, 2005. We further ask that these leases be made available for public inspection. This step will enable the Commission, and the public, to ascertain if leases entered into during this period comply with substantive use policies and if the contents of such leases have significant implications on the pending reconsideration of EBS leasing Rules.

Respectfully submitted,

THE ITFS/2.5 GHz MOBILE WIRELESS  
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